

**PT 00-18**

**Tax Type: Property Tax**

**Issue: Government Ownership/Use**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

**MCDONALD'S  
CORPORATION,  
APPLICANT**

**v.**

**DEPARTMENT OF REVENUE  
STATE OF ILLINOIS**

**No: 99-PT-0028  
(98-19-0036)**

**P.I.N: 08-22-127-016**

**Alan I. Marcus  
Administrative Law Judge**

**RECOMMENDATION FOR DISPOSITION  
PURSUANT TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

**APPEARANCE:** Ms. Angela Dietz and Mr. Thomas J. McNulty of Neal, Gerber & Eisenberg on behalf of McDonal's Corp. (hereinafter "McDonald's" or the "applicant").

**SYNOPSIS:** This matter comes to be considered pursuant to applicant's motion for summary judgment. Applicant filed its motion after the Illinois Department Of Revenue (hereinafter the "Department") issued a determination in this matter on April 8, 1999. Said determination found that applicant's interest in real estate identified by DeKalb County Parcel Index Number 32-29-223-001 (hereinafter the "subject property") was to be assessed as a leasehold, and therefore subject to 1998 real estate taxes, under Section 9-195 the Property Tax Code, 35 ILCS 200/1-1, *et seq* (hereinafter the "Code").

The underlying controversy arises as follows:

Applicant filed an Application for Property Tax Exemption, which sought to exempt its leasehold interest in the subject property from the leasehold assessment provisions contained in Section 9-195 of the Code, with the DeKalb County Board of Review (hereinafter the “Board”) on January 4, 1999. The Board reviewed this application and recommended to the Department that the requested exemption be denied. The Department reviewed the Board’s recommendation and agreed with it via the aforementioned determination. Applicant filed a timely appeal to this determination and later filed this motion for summary disposition. Following a careful review of the motion and its supporting documentation, I recommend that applicant’s motion be denied and its interest in the subject property be subject to a leasehold assessment for the 1998 assessment year.

**FINDINGS OF FACT:**

1. The Department’s jurisdiction over this matter and its position therein are established by the admission of its determination in this matter, issued by the Office of Local Government Services on January 4, 1999. Dept. Motion Ex. No. 2.
2. The Department’s position in this matter is that applicant’s interest in the subject property is subject to a leasehold assessment under Section 9-195 of the Code. *Id.*
3. The subject property is located at 340 Carroll Ave, DeKalb Illinois, 60115 and identified by DeKalb County Parcel Index Number 08-22-127-016. Dept. Motion Ex. No. 1.

4. The subject property is located within the cafeteria area of a building commonly known as the Holmes Student Center, which is located on the main campus of Northern Illinois University (hereinafter (“NIU” or the “University”). *Id.*
5. NIU is a public university created by the Northern Illinois University Law, 110 **ILCS** 685/30-1, et seq (hereinafter the “NIU Law”). Its operations are governed by the Board of Trustees of Northern Illinois University (hereinafter the “NIU Board”), which is established as a body politic and corporate under Section 30-10 of the NIU Law, 110 **ILCS** 685/30-10. Administrative Notice.
6. The NIU Board, through its predecessor in interest, the Board of Regents for Northern Illinois University (hereinafter the “Regents”),<sup>1</sup> held a fee simple ownership interest in the Holmes Student Center throughout the 1998 tax year. Applicant Motion Ex. No. 1.
7. Applicant, a Delaware for-profit corporation with its principal place of business located in Oak Brook, Illinois, made a Proposal for Fast Food Franchise in the Holmes Student Center to the Regents sometime prior to August of 1995. The Regents accepted this proposal and subsequently entered into an “operating agreement” (hereinafter the “agreement”) with applicant in August of 1995. *Id.*
8. In substance, this agreement states that the NIU Board is granting applicant the exclusive right to sell certain of its trademarked food products at the subject property, the precise location of which is established by diagrams that are attached to the

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1. All powers formerly held by the Board of Regents, including its powers over real estate, were transferred to the NIU Board under the terms of 110 **ILCS** 685/30-35, which became effective January 1, 1995. Administrative Notice.

agreement, for a minimum of 10 years in exchange for the applicant's agreeing to pay certain percentage commissions to the NIU Board. *Id.*

9. The percentage commissions are, under terms of the agreement, equal to: (1) 8% of the cash value of the gross sales<sup>2</sup> that applicant generates from its use of the subject property during any calendar year that the agreement is in effect; and, (2) 5% of the "charge sales"<sup>3</sup> that applicant generates from said use during any such calendar year. *Id.*
10. Applicant is responsible for paying all percentage commissions no later than the 20<sup>th</sup> day of the month following the month in which the commissions are earned. It is to make such payments by mailing them to the University's Accounting Office at an address that is specifically designated in the agreement. *Id.*
11. The term of the agreement is to run for an initial period of 10 years but can be extended for two consecutive periods of 5 years each if the parties give their mutual consent. Such consent is presumed, and the term automatically extended, unless the terminating party provides written notification of its intent to the other party within 120 days of the date on which the agreement is scheduled to expire. *Id.*

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2. The agreement provides that:

Gross Sales shall be computed on sales of [applicant's] products sold [at the subject property] prior to the imposition of sales taxes and shall not include (a) the sale (but not the redemption) of gift certificates, (b) non-edible, non-profit promotional items, (c) employee sales and (d) Charge Sales. Where coupons, 2-for-1's or other discount promotions are used, only the actual sales price paid to [applicant] shall be included in Gross Sales.

Applicant Motion Ex. No. 1.

3. "Charge sales" are defined in the agreement as "those sales where a [Northern Illinois] University issued meal ticket is used in lieu of cash." However, the agreement further provides that if "the value of the meal ticket is less than the value of the meal including sales tax, [applicant] shall collect the full difference in cash from the customer." Applicant Motion Ex. No. 1.

12. Other relevant terms and conditions of the agreement are as follows:

TERM/ CONDITION	RIGHTS/RESPONSIBILITIES
Termination Of Agreement	<ul style="list-style-type: none"> <li>• Applicant may employ its sole discretion to terminate the agreement at the conclusion of the initial ten year term, provided that it supplied the NIU Board with 90 days prior written notice of its intent;</li> <li>• Applicant is also authorized to terminate the agreement if: <ul style="list-style-type: none"> <li>• Its gross and charge sales during any consecutive 12 month period of time did not equal or exceed \$325,000.00; or;</li> <li>• It was unable to obtain any necessary permit and/or approval necessary to operate its business on the subject property; or,</li> <li>• The NIU Board could not deliver possession of the subject property to applicant within 30 days after the date applicant notified that NIU Board that it was ready to commence the installation of its equipment;</li> <li>• The subject property, or the University areas immediately adjacent thereto, are damaged or destroyed by fire or other casualty.</li> </ul> </li> <li>• Either party is entitled to terminate the agreement on grounds that the other party has committed a material breach of its terms, provided that such breach is not fully cured within 30 days of the date on which the aggrieved party provides notice of the breach;</li> <li>• If the NIU Board terminates the agreement, it must provide applicant with monetary compensation for the value of the improvements that applicant placed in the subject property.</li> </ul>
Employment Matters	<ul style="list-style-type: none"> <li>• Neither party has authority to employ persons or independent contractors on behalf of the other. Thus: <ul style="list-style-type: none"> <li>• Applicant retains sole and exclusive control over the wages, hours and other working conditions (including, <i>inter alia</i>, the hire, discharge, promotion, and discipline) of its employees and independent contractors;</li> <li>• The NIU Board retains sole and exclusive control over the wages, hours and other working conditions (including, <i>inter alia</i>, the hire, discharge, promotion, and discipline) of its employees and independent contractors;</li> <li>• Applicant is solely responsible for: (1) paying the wages and other compensation that are due to its employees; and (2) making contractually required payments to its independent contractors;</li> <li>• The NIU Board is solely responsible for: (1) paying the wages and other compensation that are due to its employees; and (2) making contractually required payments to its independent contractors.</li> </ul> </li> </ul>

<b>TERM/ CONDITION (CONT'D.)</b>	<b>RIGHTS/RESPONSIBILITIES</b>
Assignment	<ul style="list-style-type: none"> <li>• In general, one of the parties cannot assign its interest in the agreement unless it obtains the express written consent of the non-assigning party.</li> <li>• Applicant could, however, transfer the “operating obligations” of the agreement to one of its subsidiaries, franchisees, licensee or partners, without the NIU Board’s consent, provided that: <ul style="list-style-type: none"> <li>• Applicant itself remains ultimately liable for performing all of the obligations it incurs under the agreement, save for those related to employment matters, as such obligations shall become the responsibility of its transferee; and,</li> <li>• The transferee satisfies whatever certification requirements may apply to vendors that do business with the State of Illinois or its instrumentalities.</li> </ul> </li> </ul>
Hours of Operation	<ul style="list-style-type: none"> <li>• Applicant is not at liberty to set its own operating hours;</li> <li>• Hours are set by the NIU Board, which dictates that applicant shall operate: (1) only at certain specified times throughout the two school semester terms; and, (2) at other specified times during “times other than the two school semester terms[;]”</li> <li>• Applicant can, however, alter its set operating hours if it determines that it is unprofitable to operate during a given time period, provided that the NIU Board consents to the alteration.</li> </ul>
Utilities & Trash	<ul style="list-style-type: none"> <li>• The NIU Board shall provide, at no cost to applicant, any gas, electricity, HVAC and other utilities except telephone service that are necessary for applicant’s operation;</li> <li>• Applicant shall be responsible for arranging for its receipt of telephone service;</li> <li>• The NIU Board shall, at its sole cost and expense, provide a trash receptacle and trash removal service for applicant. In turn, applicant shall deliver all of its waste to the receptacles that the NIU Board provides.</li> </ul>
University Equipment & Storage	<ul style="list-style-type: none"> <li>• The NIU Board is responsible for removing, at its own cost and expense, all equipment existing in or on the subject property, except for certain specifically identified fixtures designated as “University Equipment.” It is also solely responsible for the maintenance and repair of such equipment;</li> <li>• The NIU Board does, however, grant applicant the exclusive right to use the “University Equipment” throughout the duration of the agreement, and further, allows applicant to use certain specifically designated storage areas during same.</li> </ul>

<b>TERM/ CONDITION (CONT'D.)</b>	<b>RIGHTS/RESPONSIBILITIES</b>
Removal Of Equipment	<ul style="list-style-type: none"> <li>Applicant is responsible for: (1) removing all of its equipment and supplies from the subject property within 30 days of the date on which the agreement expires; and (2) repairing any damage caused by such removal.</li> </ul>
Maintenance, Security & Repair	<ul style="list-style-type: none"> <li>Applicant is responsible for: (1) keeping the subject property itself in a clean and sanitary condition at all times throughout the term of the agreement; (2) maintaining and repairing all equipment that it installs or brings onto the subject property; (3) effectuating such maintenance and repair according to the standard operating procedures that applicant establishes; (4) returning the subject property to the NIU Board when the agreement expires; and (5) ensuring that, upon return, the subject property is, with the exceptions of (a) normal wear and tear and (b) damage caused by fire or other casualty, in as good condition as when applicant originally commenced its use;</li> <li>The NIU Board is responsible for: (1) guaranteeing the structural integrity and safety of the Holmes Student Center and all University facilities adjacent thereto; (2) keeping said areas in a clean and sanitary condition; (2) providing any necessary security therefor; and (3) ensuring that the HVAC, plumbing and other systems serving the Holmes Student Center, as well as the University Equipment, are maintained in good working order.</li> </ul>
Rights of Access	<ul style="list-style-type: none"> <li>Subject to any limitations on performance attributable to circumstances beyond the parties' control (explosions, accidents, Acts of G -D, etc.), the NIU Board is responsible for providing applicant with the means of access to its (applicant's) equipment and supplies located within the subject property and the University Campus facilities immediately adjacent thereto during all times the University is open and at such other times as the parties shall mutually agree.</li> </ul>
Insurance and Indemnification	<ul style="list-style-type: none"> <li>Applicant is responsible for obtaining and maintaining all appropriate types insurance (workers compensation, products liability, casualty, property damage, etc.) for actions arising out of and at the subject property throughout the term of the agreement;</li> <li>The NIU Board is responsible for obtaining and maintaining general public liability, property damage and bodily injury insurance for actions arising out of and at the Holmes Student Center and other University facilities immediately adjacent thereto throughout the term of the agreement ;</li> <li>Indemnification is reciprocal in that the party that is not named as a defendant in any action is required to indemnify the party that is so named to the extent permitted by law.</li> </ul>

*Id.*

**CONCLUSIONS OF LAW:**

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c). Applicant's unrefuted evidence removes all issues of material fact from this case. Evangelical Alliance Mission v. Department of Revenue, 164 Ill. App.3d 431, 439 (2<sup>nd</sup> Dist. 1987). Therefore, the only remaining source of controversy herein is a legal issue, that being whether the applicant's interest in the subject property is subject to assessment under Section 9-195 of the Property Tax Code.

Section 9-195 states that:

Except as provided in Section 15-55 [which governs exemption of property owned by the State of Illinois], when property which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the property taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his or her assignee. Taxes on that property shall be collected in the same manner as property that is not exempt, and the lessee shall be liable for those taxes.

35 ILCS 200/9-195.

Applicant challenges the imposition of a leasehold assessment herein on grounds that its interest in the subject property does not qualify as a "leasehold estate" within the meaning of Section 9-195. Specifically, applicant asserts that the operating agreement under which it holds said interest is a non-taxable license to use otherwise exempt property.

The legal significance of distinguishing between licenses and leaseholds is that the former are not taxable interests, provided that they truly qualify as licenses for the use of exempt property. Jackson Park Yacht Club v. Department of Local Government

Affairs, 93 Ill. App. 3d 542, 547 (1<sup>st</sup> Dist. 1981). The latter are subject to taxation under the Section 9-195 of the Property Tax Code. *Id.*

Whether a contractual agreement is a lease or a license is determined, not from the language used, but from the legal effect of its provisions. Jackson Park Yacht Club, *supra*, at 546. Thus, it is necessary to examine the provisions of applicant's agreement with the NIU Board in light of pertinent legal definitions.

An instrument that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land and is a mere license. In re Application of Rosewell, 69 Ill. App.3d 996, 1001 (1<sup>st</sup> Dist. 1979) (hereinafter "Rosewell"). Thus, "a license is an authority to do some act on the land of another, without passing an estate in the land, and 'being a mere personal privilege, it can be enjoyed only by the licensee himself, and is therefore not assignable so that an under tenant can claim privileges conceded to a lessee.' *Id.*, citing Taylor's Landlord and Tenant, § 14.

A leasehold, however, "consists of the right to the use and possession of the demised premises for the full term of the lease." People ex rel. Korzen v. United Airlines, 39 Ill.2d 11 (1968). Accordingly, a lease has been defined as "[w]hatever is sufficient to show that one party shall divest himself of possession and the other party shall come into for a terminate time and for a fixed rental amounts to a lease." Miller v. Gordon, 296 Ill. 346, 350 (1921).

The essential requirements of a lease are: (1) a definite agreement as to the extent and bounds of the leased property; (2) a definite and agreed term; and (3) a definite and agreed price of rental and manner of payment [citations omitted]. People v. Metro Car

Rentals, 72 Ill. App. 3d 626, 629 (1<sup>st</sup> Dist. 1979). No particular words are required to create a lease *Id.* Rather, the existence of a lease depends upon the intention of the parties and this intention must generally be inferred from the circumstances of the particular case. *Id.* Generally, however, the question of possession will determine the matter. *Id.*

In applying these factors herein, it must be remembered that “one who claims an exemption from a property tax has the burden of proving, by clear and convincing evidence, that his or her property comes within the exemption, and the presumption is against the intent of the State to exempt property from taxation.” Stevens v. Rosewell, *supra*, at 61-62. Therefore, all debatable legal or factual questions must be resolved in favor of taxation. *Id.*

Applicant’s uncontested evidence removes any debatable factual questions from this case. Such evidence does not, however, eliminate all debate as to the central legal question in this case, that being whether the terms and conditions set forth within the “four corners”<sup>4</sup> of applicant’s “operating agreement” with the NIU Board are more consistent with a taxable leasehold or a non-taxable license.

Applicant correctly asserts that certain individual features of the agreement, such as the provisions that: (1) allow the NIU Board to control applicant’s hours of

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4. Applicant has confined the scope of this motion for summary judgment, and limited the context of the argumentation in support thereof, to analysis of the legal effect of the provisions that are contained within “four corners” of the operating agreement admitted as Applicant Motion Ex. No. 1. These limitations shall form the framework for all remaining analysis herein, as the interests of administrative and judicial economy require that I respond only to those arguments that applicant actually raises.

operation and (2) call for applicant to pay “percentage commissions” rather than a fixed, flat rental fee, are consistent with a non-taxable license. Nevertheless, the document contains other provisions which, whether read separately or in the context of the document as a whole, are more consistent with a taxable leasehold.

Such provisions include those which: (1) establish the extent and bounds of the leased property through diagrams that are attached to the operating agreement; (2) specifically fix both the initial 10-year term of the lease and the two 5-year renewal periods subsequent thereto; (3) grant applicant full control over the wages, hours and other working conditions of the employees that it employs at the subject property; (4) permit applicant to freely assign its interest in the subject property to one of its subordinate units (franchisees, partners, licensees, etc.) without the NIU Board’s consent under certain well-defined circumstances; (5) allow applicant to assign its interest in the subject property to parties other than one of its subordinate units in cases where the NIU Board gives written consent to the assignment; and (6) provide for reciprocal benefits and detriments so that: (a) applicant receives the benefit of being granted the exclusive right to sell certain of its trademarked food products at the subject property for a period of no less than 10 years in exchange for the detriment of paying certain well-defined percentage commissions to the NIU Board; which in turn, (b) obtains pecuniary benefit from such commissions in exchange for the detriment of foregoing its own use and control of the subject property during all periods for which the agreement remains in effect.

With respect to applicant’s disbursal of such commissions, I first note that the agreement is extremely explicit in defining: (1) the terms “Gross Sales” and “Charge

Sales,[:]" (2) the exact percentages of "Gross" and "Charge Sales" that applicant must pay as "percentage commissions[:]" (3) the precise time of the month on which applicant is to disburse such commissions to the NIU Board; and, (4) the place to which applicant is to make such payments.

Moreover, the percentages that applicant is required to pay as commissions, 8% of Gross Sales and 5% of Charge Sales, are substantially less than the 96% found to be indicative of a licensing agreement in Rosewell, *supra*. In addition, this operating agreement is unlike the document at issue in Rosewell because said agreement is devoid of language obligating the NIU Board to pay applicant a management fee by refunding a percentage of the commissions that applicant pays. *See*, Rosewell, *supra* at 1002-1003.

Payment of such a fee would indicate that applicant is a managerial agent of the NIU Board. However, the agreement specifically states that applicant is responsible for maintaining the leasehold premises and whatever property *it* may install therein. *Id.* It also provides that applicant exercise shall exercise managerial authority over its *own* employees and workplace but shall exercise no similar authority over the *University's* employees and workplace.

Read together, these above provisions effectively prevent the NIU Board from interfering with applicant's possession and quiet enjoyment of the subject property throughout the duration of the agreement. More importantly, they also have the practical effect of enabling applicant, a for profit corporation that has no connection to the University outside of the business relationship that is memorialized in the operating agreement, to operate its own commercial food establishment at the subject property free

from most of the limitations and controls that the NIU would have to impose in order to create a non-taxable license. *Accord, Stevens v. Rosewell, supra*, at 63-64.

Based on the foregoing, I conclude that the operating agreement at issue herein, when viewed in its totality, creates a taxable leasehold interest. Consequently, applicant is not entitled to judgment as a matter of law herein. Therefore, its motion for summary judgment should be denied.

WHEREFORE, for all the aforementioned reasons, it is my recommendation that applicant's interest in real estate identified by DeKalb County Parcel Index Number 32-29-223-001 should remain subject to a leasehold assessment under Section 9-195 of the Property Tax Code.

10/26/00

Date

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Alan I. Marcus  
Administrative Law Judge